

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

## WARREN WESLEY BUDNIK,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

Case No. 3:16-cv-05343-KLS

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth below, defendant's decision to deny benefits should be reversed and this matter should be remanded for further administrative proceedings.

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## FACTUAL AND PROCEDURAL HISTORY

On September 7, 2013, plaintiff filed an application for DIB, alleging disability as of January 6, 2012. *See* Dkt. 9, Administrative Record (“AR”) 12. The application was denied upon initial administrative review on March 18, 2014, and on reconsideration on September 3, 2014. *See* AR 12. A hearing was held before an administrative law judge (“ALJ”) on December 22, 2015, at which plaintiff, who was unrepresented, appeared and testified, as did a vocational expert. *See id.*

In a decision dated January 4, 2016, the ALJ determined plaintiff to be not disabled. *See* AR 12-28. Plaintiff's request for review of the ALJ's decision was denied by the Appeals Council on March 8, 2016, making that decision the final decision of the Commissioner of Social Security (the "Commissioner"). *See* AR 1-4; 20 C.F.R. § 404.981, § 416.1481. On May 12, 2016, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner's final decision. *See* Dkt. 3. The administrative record was filed with the Court on July 18, 2016. *See* Dkt. 9. The parties briefing is complete. *See* Dkts. 11, 12, 13. Thus, this matter is now ripe for the Court's review.

Plaintiff argues defendant's decision to deny benefits should be reversed and remanded for an award of benefits, because the ALJ erred: (1) by failing to assist an unrepresented claimant in fully developing the record; (2) by failing to meet the Commissioner's burden at Step Five; (3) in evaluating plaintiff's credibility; (4) in failing to properly consider the Department of Veterans Affairs ("VA") disability decision; and (5) in failing postpone the second hearing in light of the fact that plaintiff was unrepresented. *See* Dkt. 11, p. 1.

## DISCUSSION

The determination of the Commissioner that a claimant is not disabled must be upheld by  
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1 the Court, if the “proper legal standards” have been applied by the Commissioner, and the  
 2 “substantial evidence in the record as a whole supports” that determination. *Hoffman v. Heckler*,  
 3 785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Comm'r of Social Security Admin.*, 359  
 4 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A  
 5 decision supported by substantial evidence will, nevertheless, be set aside if the proper legal  
 6 standards were not applied in weighing the evidence and making the decision.”) (citing *Brawner*  
 7 *v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).  
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9 Substantial evidence is “such relevant evidence as a reasonable mind might accept as  
 10 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation  
 11 omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if  
 12 supported by inferences reasonably drawn from the record.”). “The substantial evidence test  
 13 requires that the reviewing court determine” whether the Commissioner’s decision is “supported  
 14 by more than a scintilla of evidence, although less than a preponderance of the evidence is  
 15 required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence  
 16 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.  
 17 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence  
 18 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting  
 19 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>  
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21  
 22 <sup>1</sup> As the Ninth Circuit has further explained:

23 . . . It is immaterial that the evidence in a case would permit a different conclusion than that  
 24 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by  
 25 substantial evidence, the courts are required to accept them. It is the function of the  
 26 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may  
 not try the case de novo, neither may it abdicate its traditional function of review. It must  
 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are  
 rational. If they are . . . they must be upheld.

*Sorenson*, 514 F.2d at 1119 n.10.

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1 II. VA Disability Rating

2 Plaintiff challenges the ALJ's treatment of plaintiff's 80% disability rating by the VA  
 3 (the "VA disability rating"). Dkt. 11, pp. 10-12. The VA determined plaintiff 80% disabled,  
 4 based in part on low back pain, attention deficit disorder ("ADD"), and degenerative joint  
 5 disease of the left and right ankle. AR 149-56. The VA determination notes that plaintiff has  
 6 difficulty adapting to work, near continuous panic affecting the ability to function independently,  
 7 appropriately and effectively, difficulty in adapting to stressful circumstances, near-continuous  
 8 depression affecting plaintiff's ability to function independently and appropriately, and difficulty  
 9 adapting to a work setting. AR 151. The VA disability determination also outlines plaintiff's  
 10 occupational and social impairments. AR 152.

12 Although a determination by the VA about whether a claimant is disabled is not binding  
 13 on the SSA, an ALJ must consider that determination in reaching his or her decision. *McCartey*  
 14 v. *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002); 20 C.F.R. § 404.1504. Further, the ALJ  
 15 "must ordinarily give great weight to a VA determination of disability." *McCartey*, 298 F.3d at  
 16 1076. This is because of "the marked similarity" between the two federal disability programs.  
 17 See *id.* (describing similarities in the programs). However, "[b]ecause the VA and SSA criteria  
 18 for determining disability are not identical," the ALJ "may give less weight to a VA disability  
 19 rating if he gives persuasive, specific, valid reasons for doing so that are supported by the  
 20 record." *Id.* (citing *Chambliss v. Massanari*, 269 F.3d 520, 522 (5th Cir. 2001)).

22 The ALJ gave "little weight" to the VA disability determination. AR 26. The ALJ also  
 23 noted that the VA "assigned the claimant a service-connected disability rating of 70% for ADD  
 24 and primary insomnia" and that "[t]he claimant's overall VA service-connected disability rating  
 25 is 80%." AR 26. Although the ALJ acknowledged that she "must ordinarily give great weight" to  
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1 a VA disability determination, *see* AR 26 (citation omitted), she observed that she is “not  
2 compelled to reach the identical result” in making a disability determination. AR 26. The ALJ  
3 discounted plaintiff’s VA disability determination for two reasons. First, the ALJ determined that  
4 the VA disability determination does not “satisfy the agency’s requirement of specific function-  
5 by-function work-related limitations.” AR 26. Second, the ALJ determined that the VA disability  
6 determination is already incorporated into medical opinions and “does not show the claimant is  
7 more limited” than set forth in the residual functional capacity. AR 26. The ALJ also noted that a  
8 claimant rated as having a service-connected physical impairment is “not necessarily disabled”  
9 because the process is “designed to determine a service member’s fitness for duty and/or whether  
10 or not he/she meets retention standards.” AR 26. The ALJ determined that the VA disability  
11 rating “lacks probative value” because it “does not provide a function-by-function analysis of the  
12 claimants’ abilities.” AR 26. The Court finds that the ALJ did not provide persuasive, specific, or  
13 valid reasons for giving little weight to the VA disability rating.

16 First, the ALJ rejected the VA disability determination by reciting case law and noting  
17 that the determination does not provide for a function-by-function analysis like social security  
18 determination. AR 26. The ALJ thus determined that VA disability determinations “lack  
19 probative value” because of this lack of function-by-function analysis. However, the ALJ’s  
20 determination is expressly contrary to established law. As noted above, the Ninth Circuit has  
21 specifically determined the ALJ must give great weight to VA disability determinations because  
22 of “the marked similarity” between the determinations. *McCartey*, 298 F.3d at 1076. Thus,  
23 discounting the VA disability determination because of the differences in the disability  
24 determinations is legally insufficient and fails to provide the persuasive, specific, or valid reason  
25 necessary to give little weight to the VA disability rating.

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1       Second, the ALJ rejected the VA disability determination because she determined that the  
2       VA disability rating was already incorporated into the medical opinions and accounted for in the  
3       RFC. AR 26. However, the Court finds that neither the RFC nor the ALJ's discussion of the  
4       medical opinion evidence expressly discuss every limitation assessed in the VA disability  
5       determination. As noted above, the VA disability determination found that plaintiff has difficulty  
6       adapting to work, near continuous panic and depression affecting his ability to function  
7       independently and appropriately, difficulty in adapting to stressful circumstances, and difficulty  
8       adapting to a work setting. *See* AR 149-52. The RFC does not incorporate all of these  
9       restrictions. *See* AR 16-17. Moreover, the ALJ did not cite to specific medical opinions that  
10      incorporate or discuss the limitations assessed by the VA disability determination. *See* AR 26.  
11      Thus, the ALJ's conclusory statement falls short of the specificity required by this Court. *See*  
12      *Embrey v. Bowen*, 849 F.2d 418, 421-22; *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir.  
13      1989) (the ALJ's rejection of a physician's opinion on the ground that it was contrary to clinical  
14      findings in the record was "broad and vague, failing to specify why the ALJ felt the treating  
15      physician's opinion was flawed"). Regardless, as discussed below, the ALJ erred in her treatment  
16      of the medical opinion evidence. Thus, none of the reasons offered by the ALJ to discount the  
17      VA disability determination are persuasive, specific, or valid, and the ALJ erred.  
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20      II.     Whether the ALJ's Decision is Supported by Substantial Evidence In Light of New  
21      Evidence Submitted to the Appeals Counsel.

22      Plaintiff was unrepresented by counsel at his hearing. *See* AR 12. After the ALJ issued  
23      his decision, plaintiff obtained counsel and submitted over 400 pages of new records to the  
24      appeals counsel. *See* AR 837-1255. Plaintiff argues that new records submitted to the appeals  
25      counsel—which Plaintiff maintains the ALJ should have obtained given that plaintiff was  
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1 unrepresented—undermine the ALJ’s determination. *See* Dkt. 11, pp. 5-6, 9-10.

2       The Ninth Circuit has held “when a claimant submits evidence for the first time to the  
3 Appeals Council, which considers that evidence in denying review of the ALJ’s decision, the  
4 new evidence is part of the administrative record, which the district court must consider in  
5 determining whether the Commissioner’s decision is supported by substantial evidence.” *Brewes*  
6 *v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1159-60 (9th Cir. 2012). The Appeals Council  
7 considered the medical records submitted by plaintiff (AR 2, 4); thus, the Court must consider  
8 this evidence in determining if the ALJ’s opinion is supported by substantial evidence.

9       The Court finds that, based on the new evidence submitted to the appeals counsel, the  
10 ALJ’s decision finding plaintiff not disabled is no longer supported by substantial evidence. The  
11 over 400 pages of documents submitted by plaintiff undermine the ALJ’s findings regarding the  
12 medical opinion evidence and plaintiff’s credibility. For example, in discounting plaintiff’s  
13 credibility, the ALJ observed that “[t]he first problem is that the claimant’s allegations are not  
14 consistent with the objective evidence in the record” and noted that “[t]he record contains no  
15 evidence of treatment for the first year after the alleged onset date.” AR 21. However, the newly  
16 submitted evidence demonstrates that plaintiff *was* being treated for various ailments in late 2011  
17 and early 2012—around the alleged onset date of January 6, 2012—including depression,  
18 anxiety, insomnia, and other physical impairments. *See, e.g.*, AR 1018, 1021, 1024. In addition,  
19 the ALJ afforded the State agency medical consultant Dr. Guillermo Rubio’s opinion great  
20 weight regarding plaintiff’s physical limitations and ability to conduct work-related activities.  
21 *See* AR 23. The ALJ noted that Dr. Rubio’s opinion is “consistent with the imaging studies and  
22 the results of the few physical examinations in the record.” AR 23. However, Dr. Rubio did not  
23 review the additional over 400 pages of medical records, which also contain support for

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1 plaintiff's physical impairments. *See, e.g.*, AR 837-1255. Thus, based upon new evidence  
2 considered by the appeals counsel, and based upon the record as a whole, the ALJ is required to  
3 revisit the entire sequential evaluation process upon remand.

4 **III. This Matter Should Be Remanded for Further Administrative Proceedings**

5 The Court may remand this case "either for additional evidence and findings or to award  
6 benefits." *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the  
7 proper course, except in rare circumstances, is to remand to the agency for additional  
8 investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations  
9 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is  
10 unable to perform gainful employment in the national economy," that "remand for an immediate  
11 award of benefits is appropriate." *Id.*

12 Benefits may be awarded where "the record has been fully developed" and "further  
13 administrative proceedings would serve no useful purpose." *Smolen*, 80 F.3d at 1292; *Holohan v.*  
14 *Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded  
15 where:

16 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
17 claimant's] evidence, (2) there are no outstanding issues that must be resolved  
18 before a determination of disability can be made, and (3) it is clear from the  
19 record that the ALJ would be required to find the claimant disabled were such  
20 evidence credited.

21 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).  
22 Because issues still remain in regard to the medical opinion evidence in the record and plaintiff's  
23 credibility, and because the ALJ failed to provide sufficient reasons for rejecting the VA's  
24 disability rating decision, remand for further consideration of these issues—as well as, if  
25

1 necessary, the issue of whether plaintiff is capable of performing her past relevant work or other  
2 jobs existing in significant numbers in the national economy<sup>2</sup>—is warranted.

3 CONCLUSION

4 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded  
5 plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is REVERSED  
6 and this matter is REMANDED for further administrative proceedings in accordance with the  
7 findings contained herein.

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9 DATED this 19 day of October, 2016.

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13 Karen L. Strombom  
14 United States Magistrate Judge  
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<sup>2</sup> If a claimant cannot perform his or her past relevant work, at step five of the sequential disability evaluation  
process, the ALJ must show there are a significant number of jobs in the national economy the claimant is able to  
do. *See Tackett*, 180 F.3d at 1098-99; 20 C.F.R. § 416.920(d), (e).